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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte MARTIN CLIVE-SMITH and CHRISTOPHER JOHN JONES

Appeal 2008-2237
Application 10/726,763
Technology Center 3700

Decided: September 12, 2008

Before DONALD E. ADAMS, ERIC GRIMES, and RICHARD M.
LEBOVITZ, *Administrative Patent Judges*.

LEBOVITZ, *Administrative Patent Judge*.

DECISION ON APPEAL

This is a decision on appeal from the final rejection of claims 20-22, 24, 26-32, 34-36, and 38 as obvious over prior art. Jurisdiction for this case is under 35 U.S.C. § 6(b). The rejections are affirmed.

STATEMENT OF THE CASE

The claims are drawn to a support post for a cargo container. The post comprises two axially arranged post elements in which the upper post element is extendable from the lower post element by moving it in an upward direction (Spec. 14: 15 to 15: 7; *see* Figs. 1A-1C). The upper post is fixed into position with the lower post by a flat detent that engages flat sided detent openings in each of the upper and lower posts (*see* Spec. 33: 24 to 34: 9; *see* Figs. 16A-16C).

Claims 20-22, 24, 26-32, 34-36, and 38 are appealed and stand rejected as follows:

1) Claims 20-22, 24, 26-28, 31, 34-36, and 38 under 35 U.S.C. § 103(a) as obvious over ‘326 Betjemann (U.S. Pat. No. 3,459,326, issued Aug. 5, 1969) and Wakano (U.S. Pat. No. 5,388,532, issued Feb. 14, 1995) (Ans. 4);

2) Claims 20-22, 24, 26-29, 32, 34-36, and 38 under 35 U.S.C. § 103(a) as obvious over ‘600 Betjemann (U.S. Pat. No. 3,386,600, issued Jun. 4, 1968) and Wakano (Ans. 5); and

3) Claims 30 and 31 under 35 U.S.C. § 103(a) as obvious over ‘600 Betjemann, Wakano, and Saunders (U.S. Pat. No. 4,144,984, issued Mar. 20, 1979) (Ans. 7).

Claims 20 and 30 are representative and read as follows:

20. A support post of adjustable length, comprising first and second post elements which can be moved axially of each other and have detent openings with opposing flat surfaces that are aligned with each other when the post elements are in

predetermined indexed positions, and a detent having flat face bearing surfaces on opposite sides thereof for engagement with the flat surfaces of the detent openings in the post elements to hold the post elements in the indexed positions for both lifting and stacking loads.

30. A container having support posts as in Claim 20, with discrete movable header portions individually mounted upon respective ones of the support posts and together spanning between the posts.

OBVIOUSNESS OVER ‘326 BETJEMANN AND WAKANO

Claims 20-22, 24, 26-28, 31, 34-36, and 38 stand rejected under 35 U.S.C. § 103(a) as obvious over ‘326 Betjemann and Wakano.

The Examiner finds that ‘326 Betjemann describes a support post in a demountable cargo gondola which comprises all elements of claim 20, but does not describe “a detent having flat face bearing surfaces on opposite sides thereof for engagement with the flat surfaces of the detent openings in the post elements” as in claim 20 (Ans. 4). Rather, the detent opening in ‘326 Betjemann’s support post is shown as a circular “bore” (‘326 Betjemann, Fig. 5, **36A** and **36B**; at col. 4, ll. 45-52) and the detent as a circular “bolt” (*id.* at Fig. 5, **34** and **35**).

Wakano is cited by the Examiner for its teaching of support posts (Wakano, Fig. 2, **5** and **6**) with a flat rectangular-shaped detent or “plate” (*id.* at Fig. 2, **54**; at col. 4, l. 59) and a flat rectangular-shaped detent opening or “groove” (*id.* at Fig. 2, **53**; at col. 4, l. 47-50) (Ans. 4). The stanchion

support post **6** is inserted into the stanchion support post **5** and is supported by the plate **54** when inserted into the groove **53** (*id.* at col. 4, ll. 47-58).

The Examiner finds that persons of ordinary skill in the art would have been prompted “to have incorporated the use of a flat faced detent corresponding in size to a substantial portion of the post cross section and corresponding detent openings with flat sides as disclosed by Wakano in the post disclosed by [‘326] Betjemann to spread the stacking and lifting loads over a larger cross section of the post elements” (Ans. 4-5).

Claims 20-22, 24, and 26

Appellants contend that the “Examiner is mistaken in saying that Wakano provides a teaching of the use of detents with flat face bearing surfaces” (Reply Br. 1). They argue that Wakano teaches “adjustable shelf brackets” in which element **54** is simply a flat plate upon which stanchion post **6** rests (*id.*). Appellants state that the plates are slid into the horizontal grooves in the stanchion post **5** and may be moved from groove to groove to change the height of the stanchion support post **6** (*id.*).

As argued by Appellants, Wakano teaches that post **5** contains a groove **53** into which plate **54** is inserted (Wakano, at col. 4, ll. 47-54). “The front stanchion **6**, which is inserted into the front stanchion support **5** is supported by the plate **54**” (*id.* at col. 4, ll. 50-52).

In ‘326 Betjemann, as in Wakano, there are two axially aligned support posts with an inner post inserted into an outer post (‘326 Betjemann, Figure 1, **12** and **12A**; **11** and **11A**). The detent openings in the posts are

aligned and held together in register by the circular detent bolt, stabilizing the inner post within the outer post ('326 Betjemann, at col. 4, ll. 45-63). Thus, Appellants are correct that Wakano's detent mechanism differs from '326 Betjemann's because, in the former, the detent supports the inner post inside the outer post, while in the latter, the detent engages both the inner and outer posts and holds them together.

Nonetheless, this difference does not convince us that the Examiner erred in combining the references. While '326 Betjemann describes a circular detent and detent opening, there is no teaching in the patent that would have led persons of ordinary skill in the art to believe that these shapes are necessary for the detent mechanism to perform its function. To the contrary, since all they do is perform a connecting function, it would have been reasonably expected that other detent/detent opening shapes could have been utilized by '326 Betjemann, including the flat rectangular detent support mechanism described by Wakano.

It is correct that Wakano teaches the inner stanchion 6 as resting on the flat detent, rather than having an opening through which the detent is inserted as in '326 Betjemann. However, in each patent, the detent performs the function of connecting axially aligned posts together. Consequently, the Examiner reasonably turned to Wakano's teaching of a flat detent for use in holding the post elements together in '326 Betjemann's gondola. Thus, we do not agree with Appellants that there would have been no reason for combining the references (App. Br. 3-4).

Appellants also argue that if openings corresponding to the grooves described in Wakano were cut in the stanchion supports of ‘326 Betjemann, “they would sever the stanchions and weaken the stanchion supports to the point that they would probably break” (Reply Br. 1).

Appellants have not provided any support for this position. To the contrary, as evidenced by ‘326 Betjemann and Wakano, we find that persons of ordinary skill in the art were experienced in coupling extensible posts to each other utilizing different detent-type mechanisms. Accordingly, we agree with the Examiner that persons of ordinary skill in the art would have known how to construct a flat detent mechanism in order for it to operate in the manner taught by ‘326 Betjemann (*see* Ans. 8-9).

Appellants also contend that:

[T]he Examiner makes the totally unsupported and erroneous argument that the use of a flat plate as a detent to spread stacking and lifting loads over a larger cross section of post elements would be knowledge generally available to one of ordinary skill in the art. That argument epitomizes the error in the Examiner’s position. Having been unable to find such a teaching in the prior art, the Examiner now, for the first time, in his Answer, suggests that it would be “knowledge generally available to one of ordinary skill in the art.” That, with all due respect, is outrageous.

(Reply Br. 2.)

Precise teachings directed to the specific subject matter of a claim are not required to reach a conclusion of obviousness. *KSR Int’l Co. v. Teleflex Inc.*, 127 S. Ct. 1727, 1741 (2007). “[T]he teaching, motivation, or suggestion may be implicit from the prior art as a whole, rather than

expressly stated in the references. . . . The test for an implicit showing is what the combined teachings, knowledge of one of ordinary skill in the art, and the nature of the problem to be solved as a whole would have suggested to those of ordinary skill in the art.” *In re Kahn*, 441 F.3d 977, 987-988 (Fed. Cir. 2006). In this case, the Examiner appears to have drawn from general knowledge that a flat detent would spread the stacking and lifting load, prompting a person of ordinary skill in the art to have utilized Wakano’s flat detent in place of a circular detent mechanism for the gondola container. We see no legal error in the Examiner’s position.

The Examiner’s assertion that a flat detent would spread the load over a larger cross section than a circular detent (*see* Ans. 5) appears to be a statement of a straightforward physical principle that would generally be understood without the need to resort to extrinsic evidentiary support. Other than characterizing the Examiner’s position as “outrageous” and improper, Appellants have not identified any flawing in the Examiner’s reasoning.

Moreover, we find that a flat detent would have been recognized as functionally equivalent to a circular detent. “[W]hen a patent ‘simply arranges old elements with each performing the same function it had been known to perform’ and yields no more than one would expect from such an arrangement, the combination is obvious.” *KSR*, 127 S. Ct. at 1740.

For the foregoing reason, we affirm the rejection of claim 20. Claims 21, 22, 24, and 26 fall with claim 20 because separate reasons for their patentability were not provided.

Claims 27, 28, 31, and 34

Claims 27, 28, 31, and 34 are drawn to containers having the support post of claim 20. Appellants contend that neither ‘326 Betjemann nor Wakano “is concerned with a container” (App. Br. 4). They assert that ‘326 Betjemann describes “an open gondola for uncrated cargo” and “goes to considerable length to distinguish between a gondola and a container (*see* Col. 1, line 59 to Col. 2, line 31)” (*id.*)

The cargo gondola described in ‘326 Betjemann is described as a device “adapted to accommodate uncrated cargo, such as Jeeps, ambulances and other vehicles” (‘326 Betjemann, at col. 1, ll. 44-47). In other words, it holds or “contains” cargo and thus is accurately characterized by the Examiner as a container. The gondola is also expressly referred to by ‘326 Betjemann as a “gondola container” (*id.* at col. 5, ll. 51-52 and 59-60). Consequently, Appellants’ argument is without merit.

At column 1, line 59 to column 2, line 31, ‘326 Betjemann distinguishes its cargo gondola from prior art cargo containers. However, we do not see any language in this section, as asserted by Appellants, denying that the gondola is also a cargo container (App. Br. 4).

We affirm the rejection of claims 27, 28, 31, and 34.

Claim 35 and 36

Independent claims 35 and 36 are drawn to posts with apertures or openings with flat sides and detents with flat surfaces to engage in the

apertures or openings. Appellants argue, as they did for claim 20, that the references do not suggest these features (App. Br. 4-5).

As this argument is the same as for claim 20, we affirm the rejection of claims 35 and 36 for the reasons discussed above.

Claim 38

Independent claim 38 is drawn to support post for a container having “laterally extending rectangular openings” and “a relatively flat detent pin of rectangular cross section.” Appellants argue that the references do not teach or suggest the claimed rectangular opens and corresponding rectangular detent pin (App. Br. 5).

We have already concluded that flat rectangular detent openings and detents would have been reasonably suggested to persons of ordinary skill in the art by the combination of Betjemann ‘326 and Wakano (*see supra* at pp. 4-5). Appellants’ arguments do not further distinguish this claim. Accordingly, we affirm the rejection of claim 38.

OBVIOUSNESS OVER ‘600 BETJEMANN AND WAKANO

Claims 20-22, 24, 26-29, 32, 34-36, and 38 stand rejected under 35 U.S.C. § 103(a) as obvious over ‘600 Betjemann and Wakano.

Appellants acknowledge that the “rejection is essentially the same” as the rejection over ‘326 Betjemann and Wakano and distinguish the claims for the same reasons (App. Br. 5).

As we did not find their arguments persuasive for the rejection involving ‘326 Betjemann, we also do not find them convincing for the rejection in which the similar disclosure of ‘600 Betjemann is substituted for the ‘326 patent. The rejection of claims 20-22, 24, 26-29, 32, 34-36, and 38 is affirmed.

OBVIOUSNESS OVER ‘600 BETJEMANN, WAKANO, AND
SAUNDERS

Claims 30 and 31 stand rejected under 35 U.S.C. § 103(a) as obvious over ‘600 Betjemann, Wakano, and Saunders.

Claim 30 is directed to a container having support posts as in claim 20, but additionally comprising “discrete movable header portions” mounted on the support posts. A “header” is described in the Specification as a “beam” (Spec. 8: 4-7).

The Examiner finds that ‘600 Betjemann and Wakano describe all the elements of the claimed invention “except for discrete movable header portions mounted on the support posts as movable end gates” as in claim 30 (Ans. 7). However, the Examiner finds that Saunders describes a cargo shipping container with movable end gate and states that persons of ordinary skill in the art would have had reason to mount the gates to ‘600 Betjemann’s shipping container “to provide an easy means for accessing the container deck from the end of the container without having to remove the end gate completely from the container” (Ans. 7).

In setting forth a case of obviousness, “it can be important to identify a reason that would have prompted a person of ordinary skill in the relevant field to combine the elements in the way the claimed new invention does . . . because inventions in most, if not all, instances rely upon building blocks long since uncovered, and claimed discoveries almost of necessity will be combinations of what, in some sense, is already known.” *KSR*, 127 S. Ct. at 1741. In this case, the Examiner provides a logical reason as to why persons of ordinary skill in the art would have been prompted to combine Saunders’s disclosure with ‘600 Betjemann and Wakano to have made the claimed invention. Thus, we turn to Appellants’ rebuttal arguments.

Appellants contend that Saunders’s shipping container is “an entirely different type of structure” than that taught by ‘600 Betjemann and Wakano and there is no basis to combine them (App. Br. 6). They assert:

Like the first Betjemann patent, neither Betjemann ‘600 nor Wakano discloses a container. The device in Betjemann ‘600 is another open gondola, and the device in Wakano is a pallet. There is no reason to put movable headers or doors on either of them. The decks are fully accessible as shown.

(App. Br. 6).

This argument is not persuasive. ‘600 Betjemann explicitly refers to its gondola as a “shipping container” (‘600 Betjemann, at col. 1, ll. 10-11). ‘600 Betjemann also states that its gondola container can be fitted with end gates and acknowledges that “other expedients may be used to connect the end gates to the gondola” than those described in the patent (*id.* at col. 4, ll. 71-75). This expressly suggests that other gate mechanisms may be utilized

in the gondola, including a movable gate as in Wakano “to provide an easy means for accessing the container deck . . . without having to remove the end gate completely from the container” (Ans. 7) as would be necessary with ‘600 Betjemann’s gate.

For the foregoing reasons, we affirm the rejections of claims 30 and 31 as obvious over ‘600 Betjemann, Wakano, and Saunders.

TIME PERIOD

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a).

AFFIRMED

LP

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